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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 843

PAUL V. CASE,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE PETITIONER

DANIEL JOHN MEADOR
Charlottesville, Virginia
Counsel for Petitioner

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Nebraska (R. 22-29) is reported at 177 Neb. 404, 129 N.W.2d 107.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on June 19, 1964 (R. 30). The petition for a writ of certiorari was filed on July 11, 1964, and was granted on January 18, 1965 (R. 31). The jurisdiction of the Court rests on 28 U.S.C. § 1257(3).

Statutes Involved

Pertinent statutes of the State of Nebraska are set out in Appendix A, *infra*.

Questions Presented

1. Whether this Court will require a State to comply with the constitutional command to provide some means whereby a prisoner can be heard on his claim that he is confined in violation of his constitutional right to counsel.

2. Whether a State which makes the writ of habeas corpus available to attack void convictions may discriminate against federal law by allowing the writ for violations of state law which render a conviction void while denying the writ for violations of the right to counsel which likewise render a conviction void.

Statement

The Petitioner, Paul V. Case, is confined under a sentence for burglary in the Nebraska Penal and Correctional Complex. He commenced this habeas corpus proceeding *in forma pauperis* in the District Court for Lancaster County, Nebraska, on September 9, 1963. His petition and accompanying papers show the following facts.[1]

On the night of April 14-15, 1963, petitioner was stopped by the police while he was walking along a street in Lincoln, Nebraska. He was taken into custody, and at about 1 A.M.

[1] Since the petition was dismissed with neither a response from the state nor a hearing, the facts alleged and appearing from the attached papers must be taken as true. *White* v. *Ragen*, 324 U.S. 760; *Smith* v. *O'Grady*, 312 U.S. 329. Petitioner was not represented by counsel in the courts below.

on April 15th he was "booked" by the police on an "open charge." From then until noon of April 18th—four days later—he was held in the city jail incommunicado and in solitary confinement (R. 4-5).

On April 18th an information signed by William D. Blue, the chief deputy prosecuting attorney of Lancaster County, was filed against petitioner in the District Court for Lancaster County. It charged petitioner with unlawfully breaking and entering a dwelling in the city of Lincoln on April 14, 1963, with intent to steal property (R. 9). (Under Nebraska law this is a felony carrying a penalty of from 1 to 10 years in the penitentiary.)[2] On the same day the information was filed—April 18th—without having had any contact with counsel, petitioner was brought before Deputy Prosecutor Blue. Blue threatened petitioner with prosecution under the state's habitual criminal act[3] unless he waived preliminary hearing, waived his right to counsel, and pleaded guilty (R. 3-4, 5, 8).

Thereafter, still on April 18th, petitioner came before the district court. The court's journal entry recites:

> Now on this day comes the Deputy County Attorney, William D. Blue, on behalf of the State of Nebraska and defendant appears in court and after waiving his constitutional rights, said defendant standing at the bar of this court in open court is duly arraigned on the information filed against him herein, and said

[2] Neb. Rev. Stat. § 28-532. (The text of this statute appears in Appendix A, *infra*.) Petitioner later filed another habeas corpus petition in the state court attacking this burglary statute for vagueness. A dismissal of that petition was affirmed in *Case* v. *Nebraska*, 177 Neb. 774, 131 N.W.2d 191 (1964).

[3] Neb. Rev. Stat. § 29-2221, the habitual criminal law, provides that for two convictions a person will be sentenced to not less than 10 nor more than 20 years in the penitentiary. The record does not reveal petitioner's prior criminal record.

> information having been read to him, he is duly inquired of by the Court whether he is guilty or not guilty of the offense charged against him in said information, and the defendant for his answer thereto says he is "Guilty." The Court accepts said plea and finds the defendant guilty as charged (R. 10).

Sentencing was then deferred pending a pre-sentence investigation. "At *no time* was counsel present in the Court for the benefit of the defendant—or to advise him of his rights"[4] (R. 6).

Petitioner alleges in his habeas corpus petition that he was "fast talked" and "forcibly coerced" into waiving his right to have the advice of counsel, his right to have a preliminary hearing, and his right to plead not guilty (R. 3). Mr. Blue, the prosecutor, "did willfully, forcefully, and feloniously coerce and harass this Petitioner into waiving his fundamental Constitutional Rights—contrary to the laws and guarantees of the U.S. Constitution as set forth in the Sixth Amendment and made forcing [sic] on the State of Nebraska by the Fourteenth Amendment" (R. 8).

On May 2, 1963, petitioner was again brought before the court and was sentenced to five years imprisonment in the Nebraska Penal and Correctional Complex (R. 11). He is now confined there under that sentence (R. 2-3, 12). Apparently no motion for new trial was filed and no appeal was taken.

On September 9, 1963, petitioner commenced the instant proceeding by filing a petition for habeas corpus in the District Court for Lancaster County, the court where he was convicted and sentenced. Without holding a hearing and without any response from the state, the district court dis-

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[4] Neb. Rev. Stat. § 29-1803 (1963 Supp.) requires appointment of counsel.

missed the petition. No opinion was written. The order stated only that "the Court finds that the petition does not state facts sufficient to require the issuance of the Writ of Habeas Corpus asked by the petitioner and does not state a cause of action for the issuance of the Writ" (R. 16). The petitioner thereupon took an appeal to the Supreme Court of Nebraska (R. 17).

In its opinion affirming the dismissal, the Nebraska Supreme Court set forth petitioner's factual allegations and then discussed *Gideon* v. *Wainwright*, 372 U.S. 335, and other decisions of this Court concerning the right to counsel. The court noted that the due process clause guarantees the assistance of counsel unless it is understandingly waived and that courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights. Quoting from *Carnley* v. *Cochran*, 369 U.S. 506, which in turn referred to *Rice* v. *Olson*, 324 U.S. 786, the Nebraska court noted that the appearance at trial of an accused without counsel, the silence of the record as to a request for counsel, and the entry of a guilty plea might raise a factual issue as to whether the accused understandingly waived his rights, an issue which if disputed required a hearing. Here, the court noted, the petitioner alleged that he did waive counsel but he also alleged that the waiver was the result of official coercion. The court acknowledged that this coercion would vitiate the waiver, but, it added: "Whether the facts in the cause before us would show any such coercion is not before us and in view of our decision could not come before us in this type of action" (R. 26).

The Nebraska Supreme Court then proceeded to discuss the scope and function of the state's writ of habeas corpus. "Habeas corpus is not available," it said, quoting from earlier decisions, "to discharge a prisoner from a sentence

of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court" (R. 27). Viewing petitioner's claim as not within this scope, the court held that the Nebraska courts were without jurisdiction to review this conviction in a habeas corpus proceeding. Accordingly, the district court's dismissal of the petition was affirmed (R. 30). The opinion did not mention whether there was any other remedy open to petitioner in the Nebraska courts.

The petitioner thereupon sought review of the Nebraska judgment by a petition for certiorari in this Court. Upon request of this Court the state filed a response stating: "For all practical purposes, there is no collateral remedy available in the Nebraska courts to a state prisoner who alleges that a violation of his federal constitutional rights occurred in connection with his conviction and whose claim has not yet been considered by the state courts, unless the prisoners' claim is predicated upon a lack of jurisdiction of the sentencing court over the offense or over the person of the accused."

Certiorari was granted on January 18, 1965, along with leave to proceed *in forma pauperis* (R. 31). 379 U.S. 958. Counsel was thereafter appointed to represent petitioner. 379 U.S. 995.

Summary of Argument

I.

Petitioner's allegations, which must be accepted as true at this point, show that after being arrested and held incommunicado for four days he was charged with burglary, a felony punishable by ten years in the penitentiary. He was then and there threatened by the prosecuting attorney with prosecution under the state's habitual criminal law unless

he would waive his right to counsel, waive preliminary hearing, and agree to plead guilty. As a result of this coercion petitioner did give up his right to counsel and did plead guilty. On that plea he was found guilty and sentenced to five years imprisonment. At no time from arrest through sentencing did petitioner have the assistance of a lawyer.

These allegations show prima facie a violation of the Fourteenth Amendment. The right to counsel established unqualifiedly for a state accused in *Gideon* v. *Wainwright*, 372 U.S. 335, cannot be taken from the accused by official coercion such as this. The coercion vitiates the purported "waiver" of counsel. Accordingly, if the state denies the allegations of coercion, which it has not yet done, petitioner is entitled to an evidentiary hearing. If he proves his allegations, or if they go undenied by the state, the conviction and sentence must be set aside. But the Nebraska court has dismissed the petition without any response from the state and without holding a hearing.

II.

The Nebraska court's dismissal of the petition without a hearing, together with Nebraska law as a whole, shows that the state provides *no* remedy for petitioner. Habeas corpus is unavailable, as the court held in this very case, because it lies only for jurisdictional defects in the conviction and under the Nebraska view this does not include violation of the right to counsel. Coram nobis is unavailable because it lies only if the facts on which the claim rests were unknown and undiscoverable by the petitioner at the time of his trial; the facts on which the right to counsel is based here were known to petitioner during his trial. The time for filing a new trial motion and for appealing has expired. Thus no corrective process for this constitutional violation exists in Nebraska. The state, in its response to the certiorari petition, expressly concedes this.

Beginning at least with *Mooney* v. *Holohan*, 294 U.S. 103, 113, this Court has often said that a state is constitutionally required to provide corrective process for due process violations in its criminal prosecutions. This is an aspect of the fundamental right to be heard in one's defense. Due process forbids a state to incarcerate a man without affording him some adequate means to be heard on his claim that his incarceration contravenes the United States Constitution. The Supremacy Clause and the Fourteenth Amendment together require this. A state prisoner thus has a due process right to corrective process for due process violations in his conviction. Nebraska, by the judgment refusing a hearing in this case, has disobeyed the constitutional command to furnish a remedy for transgressions of the Fourteenth Amendment. There is, accordingly, no valid state ground on which the judgment can stand.

The fact that a new trial motion and appeal are provided for by Nebraska law and were theoretically available to petitioner at one time does not necessarily mean that he has had a constitutionally adequate opportunity to litigate his claim. Since the claim involves pre-trial coercion and thus rests on facts outside the record it could not have been asserted on appeal. Apart from this, a new trial motion or appeal would not have been adequate if petitioner was without counsel and was unable to obtain counsel; other circumstances may also have made those remedies ineffective. The adequacy of the prior remedies thus depends on facts which only an evidentiary hearing can divulge. But Nebraska has refused to conduct any inquiry. On this record, it cannot be said that petitioner has or has ever had any realistically effective corrective process.

In the past the Court has responded to defaults of state corrective process by making federal corrective process available. To this end federal habeas corpus has been given

broad scope. The continued failure of many states to meet their constitutional obligation has caused state prisoners asserting due process defects in their convictions to resort increasingly to the federal district courts. This in turn has brought the federal judiciary increasingly into state criminal administration, thereby heightening state-federal friction. This situation can be altered by the Court's now enforcing the constitutional requirement of state corrective process. State cases would then be disposed of in the state courts with a much higher degree of finality than at present, and mounting federal dockets would be substantially relieved. Harmonious federalism would be fostered, as the Court noted in *Henry* v. *Mississippi*, 379 U.S. 443, in remanding for a hearing in the state courts rather than relegating the prisoner to federal habeas corpus as in the past. This case should therefore be remanded for Nebraska to comply with the Constitutional mandate to afford petitioner a remedy.

III.

Nebraska law allows habeas corpus to attack a conviction which is void or where the convicting court lacked jurisdiction. But Nebraska refuses to make habeas corpus available where such invalidity rests on federal law; the only grounds of voidness or lack of jurisdiction which the Nebraska courts will litigate on habeas corpus are those based on state law. This is an unconstitutional discrimination against federal law.

Under the reasoning of *Testa* v. *Katt*, 330 U.S. 386, the Supremacy Clause forbids a state to refuse to entertain federal law claims if it entertains similar state law claims and has judicial machinery appropriate for litigating the federal claim. Habeas corpus in Nebraska is appropriate for holding an evidentiary hearing and adjudicating peti-

tioner's asserted denial of right to counsel. Under *Johnson* v. *Zerbst*, 304 U.S. 458, made applicable to the states by *Gideon* v. *Wainwright*, 372 U.S. 335, a court lacks jurisdiction to enter judgment, and its proceedings are void, unless the constitutional guaranty of counsel is met. Nebraska's refusal to hear this jurisdictional claim grounded on federal law, while at the same time hearing similar jurisdictional claims grounded on state law, contravenes the principle of *Testa* v. *Katt*. On this theory, independently of the state's obligation to provide corrective process, the case should be remanded with directions that petitioner be given a hearing.

ARGUMENT

I.

Petitioner's Allegations Show a Violation of the Constitution in That He Was Tried and Convicted Without the Assistance of Counsel After Being Coerced to Waive Counsel and Plead Guilty.

At this stage in the evolution of the right to counsel under the Fourteenth Amendment little argument or citation is needed to demonstrate that petitioner has alleged a violation of that right in this case. The papers filed by petitioner in the Nebraska trial court show that he was arrested and held incommunicado for three days; on the fourth day he was charged with burglary and was convicted on a plea of guilty entered without the assistance of counsel; counsel was waived and the guilty plea entered as the result of coercion and threats by the prosecuting attorney. For present purposes these facts must be accepted as true since they are uncontradicted.[5]

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[5] See note 1, *supra*.

It is clear that a "waiver" of counsel extracted by coercion is ineffective. A person cannot be compelled to surrender a right given him by the Federal Constitution. Cf. *Shelton* v. *Tucker*, 364 U.S. 479. A waiver, to be constitutionally binding, must be made voluntarily as well as understandingly. There can be no "intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464) where the accused is threatened with an additional prosecution as an habitual criminal, a prosecution which would result in a minimum of ten years in the penitentiary on top of whatever sentence he might get on the burglary charge.

Since the conviction here rests upon an unrepresented defendant's plea of guilty which was the product of prosecutorial threats, the case is similar to numerous others in which this Court has held that allegations of an uncounseled guilty plea showed prima facie a violation of the Fourteenth Amendment. See, e.g., *Smith* v. *O'Grady*, 312 U.S. 329; *Williams* v. *Kaiser*, 323 U.S. 471; *House* v. *Mayo*, 324 U.S. 42; *Rice* v. *Olson*, 324 U.S. 786; *Herman* v. *Claudy*, 350 U.S. 116; *Moore* v. *Michigan*, 355 U.S. 155. Discussion of "special circumstances" in some of those opinions would be irrelevant today in light of *Gideon* v. *Wainwright*, 372 U.S. 335, decided before petitioner's trial took place. The constitutional violation in those earlier cases would be even plainer now since an accused's right to counsel in state courts when faced with a serious charge such as burglary is unqualified, unless effectively waived. And the purported waiver here was vitiated by coercion.

The Nebraska Supreme Court recognized that petitioner's papers stated sufficient facts to require a hearing and that if the alleged coercion were established by evidence petitioner would have made out a violation of the Constitution (R. 25-26). The court refused to order the hearing, how-

ever, because of its holding that habeas corpus was unavailable for this kind of claim.

II.

The Nebraska Judgment Must Be Set Aside and the Case Remanded Because the State, by Refusing to Hear Petitioner's Claim, Has Breached Its Constitutional Obligation to Provide a Remedy for a Person Deprived of His Liberty in Violation of the Federal Constitution.

A. *Nebraska Provides No Corrective Process for Determining the Constitutionality of Petitioner's Imprisonment.*

That no procedure exists in the Nebraska courts whereby petitioner can be heard on his claim of unconstitutional imprisonment has been expressly conceded by the Attorney General of Nebraska in his response to the certiorari petition filed in this Court. (This portion of the response is quoted at page 6, *supra*.) That is perhaps enough to settle the point for this litigation. But apart from the concession the non-existence of any remedy in the state courts can be established from a review of Nebraska law.

1. Habeas Corpus Unavailable

The Nebraska Supreme Court, the authoritative judicial voice of the state, has made clear in this very case that the writ of habeas corpus is not available to petitioner to litigate the federal claim he is here asserting. The court affirmed the trial court's dismissal of the petition, saying that "under the statutes of this state and the decisions of this court, we have no jurisdiction to review the conviction of the petitioner in a habeas corpus proceeding" (R. 29). This holding alone suffices to establish this point.

Under this long-standing view of the Nebraska court, judicial inquiry on habeas corpus brought by a convicted prisoner is limited to the jurisdiction of the convicting court over the offense and over the person of the accused and to the question whether the sentence imposed was within the power of the court. It is also said that for relief to be granted on habeas corpus the sentence must be "absolutely void." See, e.g., in addition to the opinion in the instant case, *Jackson* v. *Olson*, 146 Neb. 885, 893-94, 22 N.W.2d 124, 129-30 (1946), and cases there cited. This judicial position rests in part on language in the state habeas corpus statute. The statute makes the writ available to one unlawfully deprived of his liberty "except persons convicted of some crime or offense for which they stand committed . . ." Neb. Rev. Stat., § 29-2801. (For complete text of this statute see Appendix A, *infra*.) The court apparently construes this statutory language to read "*validly* convicted," thereby justifying the writ where the conviction is "void" or rendered without "jurisdiction." *In re Application of Dunn*, 150 Neb. 669, 35 N.W.2d 673 (1949).

The Nebraska view, however, as to what will show a conviction to be void or to have been rendered without jurisdiction does not include a violation of the Fourteenth Amendment right to counsel.[6] This was made dramatically clear after this Court's reversal of the Nebraska court in *Hawk* v. *Olson*, 326 U.S. 271, a case in which a right-to-counsel claim was asserted on state habeas corpus. On remand the state supreme court reiterated that habeas corpus was unavailable; it took the unusual step of refusing to order a hearing in the trial court despite the direction to do so in this Court's mandate. *Hawk* v. *Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946). As the instant case shows, this

[6] This in itself forms an independent basis for a reversal by this Court in this case. See Part III of the Argument, *infra*.

view as to the scope of the writ has been adhered to despite such decisions by this Court as *Johnson* v. *Zerbst*, 304 U.S. 458, *Gideon* v. *Wainwright*, 372 U.S. 335, and *Fay* v. *Noia*, 372 U.S. 391.

In the present proceeding the petitioner argued to the Nebraska court that in light of these recent developments the state's habeas corpus should now be opened up to his claim. As the Nebraska court stated it:

> The petitioner now urges that because of the decisions of the Supreme Court of the United States hitherto discussed, Gideon v. Wainwright, *supra*, together with the rules respecting the appointment of counsel and the requirements as to the waiver of counsel in Carnley v. Cochran,[1] *supra*, and other similar federal cases, the courts of this state should now consider the evidence relating to the sufficiency of the petitioner's waiver of counsel and plea of guilty in a habeas corpus as well as in a direct proceeding in error or by appeal (R. 29).

But the court below explicitly rejected this suggestion, saying that Nebraska law remained "unchanged" (R. 29). The writ appears not to be available for any Fourteenth Amendment violation.

It may be noted that in response to arguments similar to petitioner's, based on the evolving pattern of this Court's adjudications on due process and federal habeas corpus, the courts in some states have by judicial construction broadened the scope of their post-conviction collateral remedies to allow a claim like petitioner's to be litigated. See, e.g., *Rice* v. *Davis*, 366 S.W.2d 153 (Ky. 1963); *State* v. *Boles*, 131 S.E.2d 722, 728 (W. Va. 1963); *People* v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965); *Hunt* v. *Warden*,

[1] 369 U.S. 506.

335 F.2d 936, 941-42 (4th Cir. 1964) (discussing the expanding Maryland remedy). Other judges have at least suggested doing this. E.g., *People* v. *Wilson*, 18 App. Div. 2d 424, 430, 239 N.Y.S.2d 900, 906 (1st Dep't 1963); *Ex parte Aaron*, 275 Ala. 377, 381-82, 155 So.2d 334, 337-38 (1963) (dissenting opinion); *Donnell* v. *Nash*, 323 F.2d 850 (8th Cir. 1963) (discussing the possibility of a broadened Missouri remedy); *Cobb* v. *Balkcom*, 339 F.2d 95, 100 (5th Cir. 1964) (commenting on Georgia's procedure). The states also have been urged on various occasions to make their post-conviction procedures coextensive with federal habeas corpus.[8] But the Nebraska Supreme Court thus far has elected not to follow such a course. For not only is habeas corpus closed to petitioner's claim that he is incarcerated in violation of his constitutional right to counsel, but there is also no other machinery in Nebraska presently available for this purpose.

2. Coram Nobis Unavailable

The writ of error coram nobis is recognized in Nebraska but with such a circumscribed function that it affords no avenue of relief for petitioner. The leading Nebraska decision on coram nobis is *Carlsen* v. *State*, 129 Neb. 84, 261 N.W. 339 (1935), the first authoritative pronouncement that this venerable common law writ exists there at all. In that opinion the court carefully reviewed the pertinent history and concluded: "The writ of error *coram nobis*, to bring into the record facts which were unknown to the defendant at the time of the trial through no lack of reasonable dili-

[8] See Brennan, Some Aspects of Federalism 19-21 (address to Conference of Chief Justices, Aug. 7, 1964); National Ass'n of Att'ys Gen., Conference Proceedings, 1964, pp. 42-43 (remarks of Arthur J. Sills, Att'y Gen. of New Jersey), 149-50 (resolution of the Association); Meador, Accommodating State Criminal Procedure and Federal Post Conviction Review, 50 A.B.A.J. 928 (1964).

gence on his part which, if known at the time of trial, would have resulted in a different judgment, exists in this state . . . Coram nobis does not lie to bring into the record facts known to the petitioner before judgment." (261 N.W. at 346, 347.)

In the instant case petitioner, in the nature of things, knew full well at the time of his burglary trial that he had no counsel, that he had been coerced to waive counsel and coerced to plead guilty. Since he knew those facts at that time, coram nobis, by the Nebraska view, is unavailable. This has been made clear by further adjudication in Nebraska since the definitive *Carlsen* opinion.

The unavailability of coram nobis is shown dramatically in the long drawn efforts of Henry Hawk to litigate his claim that he was denied the effective assistance of counsel in a Nebraska prosecution for homicide. (This litigation is traced in its entirety in Appendix B, *infra.*). After several abortive attempts to get a hearing, Hawk filed a habeas corpus petition in the federal district court. *Hawk* v. *Olson,* 66 F. Supp. 195 (D. Neb. 1946).[9] The district judge was presented with the question whether Hawk had exhausted his remedies in the Nebraska state courts. He noted that habeas corpus was unavailable as a result of the square holding to that effect in *Hawk* v. *Olson,* 146 Neb. 875, 22 N.W.2d 136 (1946). This turned the inquiry to coram nobis. Apparently the Nebraska attorney general, "in the face of the court's prompting," would not even so much as argue that coram nobis gave Hawk any remedy. (66 F. Supp. at 199.) The district judge nevertheless undertook a study of the question on his own. As a result, he "was led to an impression, perhaps not attaining the stature of an opinion, that, in the petitioner's plight, the ancient writ is

[9] Affirmed *sub nom., Hawk* v. *Jones,* 160 F.2d 807 (8th Cir.), *cert. denied,* 332 U.S. 779 (1947).

not practically available to him, and can hardly be more than a mirage to be pursued only to inevitable despair." (66 F. Supp. at 199.) This was because Hawk at the time of his trial, like petitioner here, knew the facts on which his federal claim was based. Despite this well-formed conclusion, the district judge felt compelled by a then recent decision of this Court[10] to deny relief pending further efforts by Hawk in the state courts. Hawk thereupon filed a petition for coram nobis in the Nebraska court.

The federal judge's "impression" proved to be correct; coram nobis did indeed turn out to be a "mirage." The Nebraska Supreme Court affirmed the trial court's dismissal of the coram nobis petition, reciting that "Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied." *Hawk* v. *State*, 151 Neb. 717, 720, 39 N.W.2d 561, 565 (1949).[11] This was in line with the previous decision of *Swanson* v. *State*, 148 Neb. 155, 26 N.W.2d 595 (1947), holding, for the same reason, that coram nobis was unavailable to pass on a claim of ineffective representation of counsel.

Only last year another Nebraska prisoner filed a habeas corpus petition in the federal district court with allegations of deprivation of counsel and a coerced plea of guilty similar to petitioner's allegations in the instant case. Again the question of exhaustion of state remedies was presented. On this occasion the federal judge, with the benefit of the *Hawk* litigation eighteen years earlier as well as other more recent Nebraska decisions, concluded unequivocally that neither habeas corpus nor coram nobis could be employed

[10] *Woods* v. *Nierstheimer*, 328 U.S. 211.

[11] Thereafter federal habeas corpus issued and Hawk was ordered released. He died a month later, 17 years after his conviction. See Appendix B, *infra*.

in Nebraska to hear this claim. Coram nobis was not open because, as in the instant case, the facts on which the claim rested were known to the accused at the time of his trial. The federal judge thus held that for petitioner's claim there was no presently available remedy in Nebraska. *Shupe* v. *Sigler*, 230 F. Supp. 601 (D. Neb. 1964).

This survey reveals that for three decades with undeviating consistency the Nebraska Supreme Court has said that coram nobis is defeated where the petitioner, as here, knew at his trial of the facts supporting his claim. And two federal district judges in Nebraska have so read the Nebraska decisions. That coram nobis is closed to petitioner is thus not merely a debatable inference drawn from generalized pronouncements. This remedy has been held unavailable explicitly by both state and federal courts in the face of Fourteenth Amendment claims of infringement of right to counsel like that which petitioner here asserts. *Hawk* v. *State, supra; Swanson* v. *State, supra; Shupe* v. *Sigler, supra.* There is no scintilla of evidence in Nebraska law which would enable this Court to infer that coram nobis might possibly be available. On the contrary, all the evidence suggests that the Nebraska court's repeated declaration as to the scope of that writ is to be believed, as is the concession of the state's attorney general in this case (page 6, *supra*).

3. No Other Remedies Presently Available

Other possible remedies in the state courts have been closed to petitioner long ago. Under Nebraska law a motion for new trial in a criminal case must be filed within ten days of verdict. Neb. Rev. Stat. § 29-2103. (Appendix A.) For newly discovered evidence this time is extended to three years, but petitioner cannot invoke that ground; his claim rests on no such new evidence. Direct appellate review of a

conviction may be had only if a notice is filed in the trial court within one month after judgment. Neb. Rev. Stat. § 25-1912 (1963 Supp.). (Appendix A.) Since petitioner was found guilty on April 18, 1963, and was sentenced on May 2, 1963—nearly two years ago—he is foreclosed from moving for a new trial and from seeking direct review in the state supreme court.

Nebraska has a typical declaratory judgment statute. Neb. Rev. Stat. § 25-21,149. (Appendix A.) But there is nothing in all the state's law to suggest even a remote possibility that this furnishes a mode of litigating petitioner's claim. Declaratory actions are not usually considered part of the criminal process in any jurisdiction. In view of Nebraska's refusal to make the traditional prisoners' remedies of habeas corpus and coram nobis available for this claim, it is certain that the state courts would not view a declaratory action as appropriate.

The inescapable result is that Nebraska is today confining the petitioner in its prison without providing any way in which he can get a judicial determination that his confinement is in violation of the United States Constitution. The state's concession, filed with this Court, indeed settles this point. The decision below, therefore, is not merely a decision that the inappropriate state remedy has been selected. This is not a situation in which a complaining party has made, so it turns out, an incorrect choice among several possible procedural routes, the consequence of which is that he starts over again along the proper route. For here no route exists. The opinion below, if viewed in isolation, appears to hold only that habeas corpus does not lie in these circumstances. But when viewed, as it must be, in the totality of Nebraska jurisprudence, the decision is in

effect that the state provides no remedy for petitioner. As shown hereafter, the decision thus puts Nebraska in a position which no state can assume consistently with the Constitution.

B. *A State Is Constitutionally Required to Provide Corrective Process for Its Convicted Prisoners.*

The principle that a state is under a constitutional duty to provide a judicial remedy for a prisoner unconstitutionally convicted in its courts is now well established. Though the principle does not appear to have been directly enforced by the Court in a case such as this, its existence and validity have been expressly articulated numerous times without dissent. And its existence has often influenced the Court's disposition of cases.

The roots of the principle can be traced to a statement in *Frank* v. *Mangum*, 237 U.S. 309, 335: "And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." This was later quoted with apparent approval in *Moore* v. *Dempsey*, 261 U.S. 86, 91. Then in *Mooney* v. *Holohan*, 294 U.S. 103, 113, in response to the state's argument that it need furnish no remedy for a prisoner asserting a constitutional defect in his conviction, the Court said: "Reasoning from the premise that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, the Attorney General urges that the state was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise."

Translating this idea into the circumstances of this case, it can be said that Nebraska takes petitioner's liberty without due process of law in two ways if it (1) incarcerates him under a sentence imposed on a coerced waiver of counsel and plea of guilty and (2) at the same time withholds any process whereby this constitutional defect in the sentence can be litigated. The first due process violation concerns petitioner's original trial for burglary. Was he there denied counsel in violation of the Fourteenth Amendment? As already demonstrated, petitioner has alleged facts which, if true, make out such a violation; the ultimate merits of this claim are not now before the Court because they can only be determined by an evidential hearing. But the state has failed to grant a hearing, and this brings up the second due process violation, the violation immediately before the Court in this case. The due process principle derived from *Frank, Moore,* and *Mooney,* requires the state to afford some means whereby petitioner can litigate his Fourteenth Amendment claim of denial of counsel. Fundamentally, this involves nothing less than the right to be heard. Specifically, in the present context, this is a prisoner's constitutional right to corrective process, which carries with it the correlative duty on the state to provide such process.

This constitutional right-duty has been acknowledged repeatedly by the Court in the thirty years snce *Mooney* v. *Holohan.* In 1943 in *New York ex rel. Whitman* v. *Wilson,* 318 U.S. 688, 690, the Court spoke of "the requirement of the Due Process Clause that a prisoner be granted a hearing on the merits" of a Fourteenth Amendment violation. A few years later in *Foster* v. *Illinois,* 332 U.S. 134, 139, the Court said that state prisoners must raise due process claims "by whatever procedure Illinois may provide or in default of relief by appropriate Illinois proceedings,

by a new claim of denial of due process for want of such relief. See Mooney v. Holohan. . . ." In *Carter* v. *Illinois*, 329 U.S. 173, 175-76, the Court said that "In respecting the duty laid upon them by Mooney v. Holohan . . ." states have a choice of remedies "so long as the rights under the United States Constitution may be pursued . . ." by some means.

In a concurring opinion in *Taylor* v. *Alabama*, 335 U.S. 252, Justice Frankfurter noted that the conviction under attack had been reviewed on appeal by a state court; but, he added:

> "The Due Process Clause of the Fourteenth Amendment does require still further protection. A State must furnish corrective process to enable a convicted person, even after such proceedings as I have outlined, to establish that in fact a sentence was procured under circumstances which offend "the fundamental conceptions of justice which lie at the base of our civil and political institutions." (335 U.S. at 272.)

When in *Young* v. *Ragen*, 337 U.S. 235, state prisoners sought unsuccessfully to attack their convictions in the state courts for due process violations, the full Court made plain the state's federally imposed duty:

> But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. And that is the effect of the denials of *habeas corpus* in a number of cases now before this Court, for in none of the cases does the Attorney General suggest that either of the other two Illinois post-trial remedies, writ of error or *coram nobis*, is appropriate. Unless habeas corpus is available, therefore, we are led to be-

> lieve that Illinois offers no post trial remedy in cases of this kind . . . We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless that requirement must be met. (337 U.S. at 238-39.)

This requirement is merely a particularized aspect of a broader principle. That principle is that state courts, absent a valid excuse, must entertain and adjudicate federal claims, a requirement placed on them by the Supremacy Clause of the Constitution. A relatively early statement of this, which was cited by the Court in *Mooney* v. *Holohan*, appears in *Robb* v. *Connolly*, 111 U.S. 624, 637:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it . . . as the supreme law of the land "anything in the Constitution or laws of any state to the contrary notwithstanding."

This theory underlies *General Oil Co.* v. *Crain*, 209 U.S. 211. In that case a suit was brought by a corporation in a Tennessee state court to enjoin a state official from collecting a tax alleged to infringe the corporation's immunity under the Commerce Clause. The state court refused to entertain the case on the basis of a Tennessee statute which provided that no court of the state had jurisdiction over this type of suit. Despite argument that this was an ade-

quate state ground to support the Tennessee judgment, this Court took jurisdiction and reviewed the federal constitutional claim on its merits. The Court, at one point in its opinion, said: "It being then the right of a party to be protected against a law which violates a constitutional right . . . . it is manifest that a decision which denies such protection gives effect to the law . . ." (209 U.S. at 228).[12]

The *General Oil* case was said by Justice Holmes, writing for the majority in *Kenny* v. *Supreme Lodge*, 252 U.S. 411, to foreshadow the decision in *Kenny* that Illinois could not decline to enforce an Alabama judgment on the ground that its courts lacked jurisdiction. The full faith and credit clause compelled Illinois to give effect to the Alabama judgment, and "it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." The state had "attempted to achieve a result that the Constitution of the United States forbad." (252 U.S. at 415.)

For other decisions reversing state court refusals to provide a remedy for asserted federal rights see *Ward* v. *Love County*, 253 U.S. 17; *McKnett* v. *St. Louis & S. F. Ry.*, 292 U.S. 230; *Testa* v. *Katt*, 330 U.S. 386. In each of those cases the state court was compelled to respect its constitutional obligation to adjudicate claims grounded on federal law. Those were all civil proceedings initiated by parties with economic interests at stake. If there is an enforceable constitutional duty on the state to furnish means for litigating those claims, surely when the state itself sets its

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[12] As one commentator described *General Oil*, "the Court said plainly that the Tennessee courts could not refuse, on the ground that the courts of the state were without jurisdiction, to entertain an action to enjoin a state taxing official from enforcing a tax alleged to violate the Federal Constitution." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507 n. 59 (1954).

criminal process in motion against a person with the object of putting him in prison the state carries an equally enforceable constitutional duty to allow some way for that person to litigate his claim that the state is acting unconstitutionally.

The right is essentially the right to be heard. As such it is among the most fundamental of all safeguards in a government under law. Indeed the right to counsel or any of the other Fourteenth Amendment rights protecting a person under prosecution would be worth little if there were no way for them to be asserted. Constitutional rights exist only at the sufferance of prosecuting officials unless there is some way an accused can invoke a court's protection for their vindication. Long ago the Court addressed itself to an analogous point in *Hovey* v. *Elliott*, 167 U.S. 409, 417-18:

> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it.

Suppose, as a specific example, that a federal district court in a criminal prosecution refused to permit the defendant to be heard on the question of the constitutionality of the Act of Congress on which the prosecution was based.

Can it be doubted that this Court would hold this to be contrary to due process, assuming that there had been no prior adequate opportunity for the constitutional question to be adjudicated? See *Yakus* v. *United States*, 321 U.S. 414.

On this record, Nebraska has imprisoned petitioner for five years "without any opportunity whatever of being heard" (*Hovey* v. *Elliott, supra*) on his claim that he was condemned in disregard of his fundamental right to the assistance of legal counsel; the state has thus taken his liberty without due process of law in its most basic sense. A new trial motion and appellate review may have been theoretically available to petitioner at one time. But on this record this Court cannot say that they were adequate remedies under the circumstances or that they afforded petitioner any realistic opportunity to be heard. If petitioner had no lawyer at any time following his conviction and was unable to obtain a lawyer he can hardly be held to have had a fair opportunity to litigate his constitutional claim. Cf. *Douglas* v. *California*, 372 U.S. 353. Whether that was the situation is a factual question which requires a hearing to resolve. But Nebraska has refused to make any inquiry of any sort. Even if it should turn out, as seems most unlikely, that petitioner had counsel in time to appeal, that remedy still would not have been adequate because his central claim of coercion rests on facts outside the trial record and thus could not have been reviewed by the state supreme court on appeal.[13]

Of course if upon a full hearing the Nebraska court found that petitioner did have an adequate opportunity at one time to assert his constitutional claim and that he deliberately waived his rights by not pursuing the remedy provided, further relief might be withheld, as is the situation

[13] Neb. Rev. Stat. § 25-1911 authorizes the supreme court to reverse, vacate or modify a district court judgment only "for errors appearing on the record."

on federal habeas corpus. *Fay* v. *Noia*, 372 U.S. 391. See *Henry* v. *Mississippi*, 379 U.S. 443, 451-52. But this determination in itself requires a judicial hearing, and there has not been any in this case. In the absence of such a determination, based on fully developed facts, Nebraska cannot constitutionally deny petitioner a hearing on his constitutional claim. For absent a determination that petitioner had and waived an adequate prior opportunity to be heard, the refusal of a hearing is in reality a refusal to allow the petitioner *any* opportunity to show that he is imprisoned in violation of the Constitution. That is the effect of Nebraska's refusal in this case, and that is what due process does not permit.

Paraphrasing the language quoted above from the *General Oil* opinion, it being the right of a state criminal defendant to be protected against a conviction obtained in violation of a constitutional right, it is manifest that a decision which denies such protection gives effect to the conviction. Thus the state's denial of protection for the constitutional right is itself a constitutional violation. It is a violation of the prisoner's right to corrective process, which is an aspect of the due process clause. A proposition similar to this was argued by counsel but not passed upon by the Court in *Smith* v. *Bennett*, 365 U.S. 708, 713 (see Brief for Petitioner, pp. 26-28).

The foregoing argument is a complete answer to any contention that the Nebraska judgment should stand because it can be said to rest on an independent state ground. This Court rejected a similar argument in *Young* v. *Ragen*, 337 U.S. 235, 238:

> Of course we do not review state decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. *Loftus* v. *Illinois* [334 U.S. 804]. But it is not simply a question of state

> procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. And that is the effect of the denial of habeas corpus in a number of cases now before this Court . . .

That likewise is the effect of the denial of habeas corpus in this case. Accordingly, there is no constitutionally valid state ground on which the judgment can be supported.

C. *This Court Should Enforce the State's Constitutional Obligation to Furnish Corrective Process for Unconstitutional Imprisonment—the Appropriate Mandate.*

The difficulties reflected in some of the Court's opinions enunciating the states' duty to provide their prisoners with corrective process do not relate to the soundness or the existence of the duty. Those difficulties concern only the problem of its enforcement. Put in terms of right and remedy, a state prisoner's constitutional *right* to state corrective process is acknowledged, but his *remedy* for the vindication of that right has not been clear. The Court has been reluctant to enforce on the states this obligation. See, e.g., *Young* v. *Ragen*, 337 U.S. 235.

In the past when a state has defaulted outright in its remedial duty the Court has side-stepped enforcement by the expedient of making federal habeas corpus available. This can be seen in *Jennings* v. *Illinois*, 342 U.S. 104, and ultimately in the *Hawk* litigation. (Appendix B, *infra*.) The Court appeared on the verge of ordering implementation of the obligation in *Young* v. *Ragen*, *supra*, when it vacated denial of state habeas corpus, saying that "If there is now no post trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case" (337 U.S. at 239). But after re-

mand, the case did not return here. (See Appendix C, *infra*, for a recap of the exchange between this Court and the Illinois courts over the existence of a state post-conviction remedy.)

The fact that the Court has wisely refrained from insisting on full obedience by the states to this constitutional command does not mean that the Court should continue to do so. Indeed there are solid reasons why the Court should now, in the instant case, give effect to this long-recognized obligation. There is no serious question of the Court's power in this connection. See Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 11[illegible] (1953).

Decisions this term and last indicate that the Court is already moving in this direction. *Jackson* v. *Denno*, 378 U.S. 368, in effect was a direction to the state to furnish adequate means for adjudicating the defendant's Fourteenth Amendment claim. The Court there held that the New York procedure for determining the voluntariness of a confession fell short of due process requirements; though the case came up on federal habeas corpus the Court remanded it with directions that the state be afforded the opportunity of holding a hearing on the confession issue, failing which the petitioner would be released without inquiry by the federal judge into the constitutionality of the confession. The release in that event would be for failure of state corrective process. See also *Boles* v. *Stevenson*, 379 U.S. 43. And in *Henry* v. *Mississippi*, 379 U.S. 443, rather than follow the policy of the past and send the state prisoner on to federal habeas corpus on the merits of his illegal search claim, the Court vacated the state judgment and remanded the case to the state court so that it could determine the question of waiver and itself decide the federal question as to the lawfulness of a search, if no

waiver were found. See *Rogers* v. *Richmond*, 365 U.S. 534, 547-49. It is but a short step from *Jackson* and *Henry* to requiring that state corrective process be effectively carried out in all respects.

1. Reasons Why the State's Obligation Should Be Enforced.

The Court's apparent reluctance in years past to compel state corrective process seems to have stemmed from an appropriate sensitivity to state procedural prerogatives within the federal system. State criminal administration after all is one of the major state concerns. The states properly exercise a large degree of autonomy in this field. The only federal interest is to see that certain procedural standards imposed by the Fourteenth Amendment are adhered to. The presuppositions of our federalism limit the national judiciary's intervention into the state criminal process to the minimum necessary to insure observance of these procedural safeguards; furthermore, such federal intervention as is necessary ought to be in the form that is least disruptive and abrasive to the states. It has been the Court's assumption, evidently, that sound federalism is better served, in the case of a state's breach of its obligation to furnish corrective process, by making federal corrective process available rather than by directing the state itself to meet its obligation. To this end, habeas corpus jurisdiction in the federal district courts has been defined broadly; the writ has been shaped to reach any constitutional violation in a state prosecution, in some circumstances despite state procedural obstacles. *Fay* v. *Noia*, 372 U.S. 391. The federal writ stands by, in other words, to cure any lack of state procedure for the vindication of federal claims.

But continued lack of adequate state procedure in many places has put a heavy load on the federal writ. This in

turn has brought about a mounting friction between the state and federal courts. This Court, as it recently said, "is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries." *Henry* v. *Mississippi*, 379 U.S. at 453. For well over a decade state judges and prosecuting officials have been voicing objections to federal habeas corpus. Since 1952 the Conference of Chief Justices has officially registered dissatisfaction. The Conference has expressed particular concern that a conviction affirmed by the highest court of a state, with review denied by this Court, could again be reviewed by a single federal trial judge and the conviction set aside long after it had otherwise become final.[14] Numerous proposals have been introduced in Congress to curtail or qualify this federal jurisdiction. Though none has yet been enacted into law, the House of Representatives has four times passed a bill of this sort.[15] Among the groups suggesting limitations, in addition to the state chief justices, have been the Judicial Conference of the United States[16] and the National Association of Attorneys General.[17] One prominent state judge has proposed the outright abolition of federal habeas corpus for convicted

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[14] This position was reiterated in a formal resolution in 1963. The Council of State Governments, Conference of Chief Justices, Aug., 1963, pp. 84-85.

[15] See H.R. Rep. No. 1384, 88th Cong., 2d Sess., 3-4 (1964). The latest bill passed by the House is H.R. 1835, 88th Cong., 2d Sess. (1964). The House debate on this bill is in 110 Cong. Rec. 14678-14684. (1964).

[16] Past and present proposals of the Judicial Conference are set out in 33 F.R.D. 365-390.

[17] In 1962 the state attorneys general adopted a resolution urging amendment to the federal habeas corpus statutes so as to give *res judicata* effect to state court determinations of fact. National Ass'n of Att'ys Gen., Conference Proceedings, 1962, p. 211.

state prisoners.[18] The situation has become intensified since the holding in *Fay* v. *Noia, supra,* that the adequate state ground of decision which forecloses direct review by this Court does not necessarily bar federal habeas corpus. As the Court noted in the *Henry* opinion, *supra,* in the federal district courts, in the one year from 1963 to 1964, the volume of habeas corpus petitions increased 85.5%.

This startling increase in federal collateral attacks on state convictions has resulted in large part from the state remedial vacuum which has left the federal district court as the only available forum for prisoners' due process claims. Coupled with the evolution in the coverage of the Fourteenth Amendment and in federal habeas corpus law, this has caused the federal judiciary to be pulled increasingly into state criminal administration. This experience shows that making federal corrective process available in case of state default—without at the same time requiring the state to provide such process in its own courts—no longer serves well the cause of harmonious federalism. Cf. *Mapp* v. *Ohio,* 367 U.S. 643, 651-53. A result has been achieved opposite from that intended by the policy of non-enforcement of the constitutional requirement.

Had the states developed effective post-conviction remedies the Court's continued deference might be a wise course. Though there is movement in the direction of broader procedures more hospitable to Fourteenth Amendment claims, a substantial number of states, like Nebraska, still retain highly restricted collateral avenues of attack on sentences. The Uniform Post Conviction Procedure Act,[19]

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[18] Desmond, Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet, 49 A.B.A.J. 1166 (1963); Desmond, Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform, 9 Utah L. Rev. 18 (1964).

[19] 9B Uniform Laws Ann. 352-59 (1957). For the Court's convenience, this Uniform Act is set out in full in Appendix D, *infra.*

first promulgated in 1955, has provided a model which, if adopted by a state, and broadly construed by its courts, would enable the state to adjudicate all federal claims, thereby reducing resort to the federal district court. But apparently only nine states have a procedure of this sort, or any variation of it.[20] Existing post conviction remedies can of course be broadened by judicial construction, and there are indications that this is being done in some states today.[21] But even so, many states retain remedies which in various ways restrict or prevent the post conviction hearing of numerous federal claims which can and must be heard by the federal district judge.[22] Accordingly, a large part of state criminal business today is channeled to the federal trial courts, to the dissatisfaction of many federal as well as state judges.[23]

This pattern can be altered if this Court will now direct the states to comply with the constitutional requirement of

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[20] Md. Ann. Code, art. 27 §§ 645-A to 645-J (Supp. 1964); N.C. Gen. Stat. §§ 15-217—15-222 (Supp. 1963); Ill. Rev. Stat. ch. 38, §§ 122-1—122-7 (1963); Ore. Rev. Stat. §§ 138.510—138.680 (1963); Maine Rev. Stat. Ann. ch. 126, § 1-A (Supp. 1963). Four states have apparently accomplished this by court rule: Alaska S.C. Rule 35(b); Del. Superior Court Rules of Crim. Proc., Rule 35; Mo. Rules of the Supreme Court, Rule 27.26; N.J. Crim. Practice Rules of Superior and County Courts, Rule 3:10 A-2. Arkansas adopted the Uniform Act in 1957 but repealed it two years later. 2 Act of Arkansas (1959) 1161.

[21] See cases cited at pages 14-15, *supra*.

[22] See Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U. L. Rev. 78, 131-33 (1964); ABA, Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities (Aug. 1958 Draft), pp. 4-20; Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 441 (1961); Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. of Pa. L. Rev. 461, 467-72 (1960).

[23] For a collection of federal judges' views see 33 F.R.D. 423-505. For the attitude of state judges see notes 14, 18, *supra*.

corrective process. A decision to that effect would almost certainly put this criminal litigation substantially back in the state courts where it belongs. And this, in turn, will do much to remove the irritant—real or imagined—of the federal district courts' participation in the state criminal field.

With the state furnishing the constitutionally required corrective process, the rule that federal habeas corpus cannot be invoked until state remedies have been exhausted (28 U.S.C. § 2254) would become more significant. A truly adequate state remedy would be much more apt to be available than at present because the state would be under an *enforceable* federal duty to provide it. The duty of course exists today, but it lacks teeth. This is not to say that a state remedy would never hereafter be found inadequate; there would no doubt still be instances of such, and the exhaustion statute, § 2254, provides for this. But to a far greater extent than at present, effective state corrective process would come into being. Troublesome questions about exhaustion would surely diminish in frequency and difficulty.

The truly important consequence of this Court's requiring the state to fulfill its obligation would be that many more state cases than at present would be finally determined in the state system. This is obviously a desideratum of federalism. Once the states began to open their courts to all claims of due process violations and began conducting full evidentiary hearings, the meritorious claims would, in the main, be recognized and relief be given. Those cases would thus never get into the federal judicial system at all. It is doubtful that in general state judges, any more than federal district judges, would reject on their merits well-founded due process claims when the issues and the full

facts finally come before the court for decision. The difficulties being encountered today, as shown by the instant case, stem from state procedure which frustrates getting claims before the courts on their merits. For prisoners denied relief on the merits a federal court would of course still be available—either this Court on certiorari or the district court on habeas corpus. Even in that event, however, the state proceeding as a practical matter would have a higher degree of finality than at present—and the burden on the federal judiciary will be reduced correspondingly.

Greater state finality will result because in most cases further evidentiary hearings on federal habeas corpus will be unnecessary. The state review of the federal claim—once the state fully assumes its obligation for corrective process—will involve a full evidentiary hearing, with a complete airing of the facts relevant to the constitutional question. If a record is kept and findings of fact made, the federal judge will then be able to exercise his discretion to decline to hear evidence. *Townsend* v. *Sain*, 372 U.S. 293, 312-13, 318-19. This would meet the complaint often heard that it is undesirable to have further *de novo* hearings on the facts in a federal court after a state conviction has become final. The power to hear evidence would remain in the federal court, but the occasions for its exercise would become less frequent. And of course it would still be open to the federal judge, as well as to this Court on direct review of the state proceeding, to hold that on the facts developed in the state hearing the state court erred in finding no constitutional violation. But that determination of law made on the record is a far less burdensome matter for federal judges and state prosecuting officials than the conducting of a full-dress evidential hearing in the federal district court.

More than this, however, adequate state post-conviction remedies would almost certainly reduce even the number of habeas corpus petitions filed in federal courts. This is shown dramatically by the Illinois experience. After it became apparent that there was really no effective post-conviction remedy in the Illinois courts, the Illinois legislature, in 1949, passed a Post-Conviction Hearing Act.[24] In the year before the Act, Illinois prisoners had filed 209 habeas corpus petitions in the federal district courts; the year after the Act's adoption these dropped to 61 petitions.[25] This Court's enforcement of the requirement of corrective process could have a similar effect in many states.

However salutary this relief for the federal judiciary might be, the central objective is to put state criminal cases back into the state courts where they belong. State control over state criminal law is contemplated by the Constitution, subject to the procedural limitations of the Fourteenth Amendment. One of those limitations is that a state may not withhold from a prisoner all means of litigating an asserted violation of that Amendment. Nebraska, by the judgment in this case, has transgressed that Constitutional limitation in its criminal process. The judgment, accordingly, cannot stand. This Court shoud direct compliance with the constitutional requirement of corrective process. By so doing it will go far toward keeping Nebraska's criminal business in Nebraska's courts.

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[24] The present version is Ill. Rev. Stat. ch. 38, §§ 122-1 to 122-7 (1963). The background of the Act is traced in Jenner, The Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 (1950). See also Appendix C, *infra*.

[25] ABA, Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities (Aug. 1958 Draft), p. 37.

Surely it is not in the interest of federalism or state criminal justice or sound judicial administration for the Court again to go through experiences such as the seventeen-year *Hawk* litigation in Nebraska (Appendix B) or the "Illinois Merry-Go-Round" of unhappy memory (Appendix C). Only forthright enforcement of Nebraska's obligation in this case will insure against a repetition of those episodes. Time and experience show that this step, which the Court considered premature in the peculiar circumstances of *Woods* v. *Nierstheimer*, 328 U.S. 211, 216, must now be taken.

This step is clearly foreshadowed by the opinion earlier this term in *Henry* v. *Mississippi*, 379 U.S. 443. In that case the state court rested on a waiver of the federal objection to the use of certain police-obtained evidence. On the facts in the record before the Court the majority appeared unwilling to say that the waiver was ineffective. In that posture, the case could have been dismissed on the basis of an adequate state ground. The majority recognized, however, that an evidentiary hearing might show that the defendant, by relevant federal standards, had not forfeited his federal right by failing to assert it in accordance with state procedure. This meant that, following a dismissal by this Court, the issue could be litigated in the federal district court on habeas corpus and that the federal court would have to conduct an evidentiary hearing. But rather than relegate petitioner to the federal habeas corpus remedy the Court vacated the judgment and remanded this case to give the state court the opportunity to hold the hearing and make the pivotal determination. The majority said:

> By permitting the Mississippi Courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations. Such a disposi-

> tion may make unnecessary the processing of the case through federal courts already laboring under congested dockets, or it may make unnecessary the relitigation in a federal forum of certain issues. (379 U.S. at 452-53.)

The same considerations call for a remand here to afford Nebraska the opportunity to adjudicate petitioner's claim, with the added injunction that Nebraska is not free under the Constitution to refuse adjudication altogether.

It was contemplated by the framers of the Constitution that the state courts would be appropriate—and perhaps the only—tribunals for adjudicating federal rights. The Constitution itself refrains from establishing inferior federal courts. This lack of constitutionally commanded courts, coupled with the Supremacy Clause, points plainly to a duty on the state judiciary, as a partner in the federal system to hear and decide federal as well as state claims.

2. The Appropriate Mandate

The Court should reverse or vacate the judgment of the Supreme Court of Nebraska and remand the case to that court for further proceedings not inconsistent with this Court's opinion. It must, of course, be made clear that due process requires a state to furnish corrective process in these circumstances and that on this record Nebraska appears not to have met this requirement.

On such a remand it would be open to the Nebraska Supreme Court to do any one of several things in compliance with the mandate:

(1) The Nebraska court could reconsider its position on the scope of habeas corpus, in light of this Court's decision, and hold that habeas corpus is now open to litigate peti-

tioner's constitutional claim.[26] Habeas corpus law is predominantly judge-made, and there is no insurmountable obstacle to the Nebraska court's saying that a violation of due process renders a sentence "void" and hence subject to collateral attack by this route.[27] If this course were taken, the state supreme court would then remand the case to the District Court for Lancaster County, where it originated, with directions that petitioner's claim be adjudicated, with a hearing on the evidence as to any disputed issues of fact.

(2) On the other hand, the Nebraska Supreme Court could stand by its position on habeas corpus but hold that coram nobis[28] or a declaratory judgment[29] is now available to petitioner. Coram nobis is a product of the common law, and the Nebraska judges are not necessarily bound by any fixed scope of that writ. They are free to hold that it is a remedy for this kind of due process defect in a trial. They are equally free to say that a declaratory judgment is the appropriate remedy. What procedure the state chooses to provide is no concern of this Court's. The state retains a wide choice of procedures, so long as there is *some effective procedure* actually provided. *Carter* v. *Illinois*, 329 U.S. 173, 176.

Whether it selects coram nobis or declaratory judgment —or something else—the state supreme court could remand

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[26] Courts in some states have been doing this in view of decisions by this Court. See cases cited at pages 14-15, *supra*.

[27] A sentence which is "void" or an "absolute nullity" is said to be subject to attack by habeas corpus in Nebraska. *Hawk* v. *O'Grady*, 137 Neb. 639, 641, 290 N.W. 911, 912 (1940); *In re Application of Dunn*, 150 Neb. 669, 675, 35 N.W.2d 673, 677 (1949).

[28] For Nebraska cases on coram nobis see pages 15-18. *supra*.

[29] Declaratory judgments are authorized by Neb. Rev. Stat. § 25-21,149 (see Appendix A).

the case to the District Court for Lancaster County for adjudication of petitioner's claim. That court could be directed to treat the petition in this case as an application for the remedy designated as appropriate. This kind of order is facilitated by a state statute abolishing the forms of action and establishing in their stead one form known as a civil action.[30] The Lancaster County district court imposed the sentence on petitioner in the first place and is accordingly the appropriate forum for coram nobis; there is nothing to suggest that it is inappropriate for a declaratory judgment, if that remedy be selected by the state supreme court. Any defect in parties respondent that might be thought to exist could be cured by a court-ordered amendment as provided for by statute.[31]

All of this is simply to point out that there are ways in which the Nebraska court can comply with a mandate from this Court requiring provision for corrective process. Any one of these appears to be open to the state supreme court without legislative action. Of course the legislature itself could respond by creating a new statutory remedy satisfying the state's constitutional obligation.[32]

At this stage of the litigation the Court need not pass on the steps to be taken if the Nebraska court should fail to comply with a mandate requiring corrective process for petitioner. It might be suggested, however, that the problem essentially is no different from actual or potential dis-

[30] Neb. Rev. Stat. § 25-101. Habeas corpus in Nebraska, as elsewhere, is considered a civil proceeding. *Selicow* v. *Dunn*, 100 Neb. 615, 616, 160 N.W. 991 (1916).

[31] Neb. Rev. Stat. § 25-852 reads: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect."

[32] See notes 19, 20, *supra*. A model is available in the Uniform Act set out in Appendix D, *infra*.

obedience of the mandate in many other cases remanded by this Court. If on the remand Nebraska failed to make corrective process available, petitioner could return here with a fresh petition for certiorari. This Court could then order petitioner's discharge from custody. That is the ultimate sanction behind the due process requirement of state corrective process. See *Dowd* v. *Cook*, 340 U.S. 206, 209-10.

Federal judicial enforcement of this requirement can be handled in the same manner as the enforcement of other due process requirements. When a federal district court, in a habeas corpus proceeding, holds that due process has been violated in a state prisoner's trial, it normally gives the state a choice: the state may re-try the accused or it may release him without more. The state, in other words, has the opportunity to remedy the due process violation by a new trial or other appropriate proceeding; if the opportunity is not taken, the prisoner must be discharged because he is held in violation of the Constitution. See *Boles* v. *Stevenson*, 379 U.S. 43. And so here. Nebraska should be given the opportunity to cure its due process violation of failure to provide corrective process. If it does not do so, then this Court, or the federal district court on a habeas corpus petition, should order petitioner released from the continued unconstitutional confinement by Nebraska—confinement in violation of petitioner's constitutional right to corrective process. *Jackson* v. *Denno*, 378 U.S. 368.

Since the hearing on the right-to-counsel claim will come in a collateral, postconviction proceeding, the remand here is not subject to the objection registered by some members of the Court to "fragmentizing" a state criminal trial. See *Henry* v. *Mississippi*, 379 U.S. at 454-55; *Jackson* v. *Denno*, 378 U.S. at 409-10.

III.

Since Nebraska Allows Habeas Corpus to Attack Convictions for Jurisdictional Defects Based on Nebraska Law, the Court Below Has Unconstitutionally Discriminated Against Federal Law by Refusing Habeas Corpus for Jurisdictional Defects Based on the Fourteenth Amendment.

Wholly apart from the enforcement of the state's obligation to provide corrective process, this case can be reversed on the alternative ground that the Nebraska court has unconstitutionally discriminated against federal law in the administration of its existing writ of habeas corpus. For if a state does provide judicial machinery for adjudicating a certain type of legal claim it cannot allow access to that machinery for claims arising under state law and at the same time deny access for similar claims arising under federal law. "A state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & S. F. Ry.*, 292 U.S. 230, 234. Nebraska does utilize the writ of habeas corpus for collateral inquiry into whether criminal convictions are null and void. However, the state refuses to hear claims that a conviction is void because of a violation of the Fourteenth Amendment. Only if the nullifying defect rests on state law will the Nebraska court inquire into it. (See Part II, A. of the Argument, *supra.*) This is a discrimination against federal law which the Constitution prohibits.

In the *McKnett* case, *supra,* Alabama had opened its courts to the litigation of tort claims arising out-of-state against foreign corporations. But Alabama sought to limit the claims which it would hear to those arising under the law of some state, thereby excluding the same kind of claim arising under the Federal Employers Liability Act. The Court held that this was an unconstitutional discrimination against federal law.

The historical background of this principle was carefully reviewed and the principle reaffirmed in *Testa* v. *Katt*, 330 U.S. 386. There an action was brought in a Rhode Island court under the Emergency Price Control Act—a federal statute—to recover treble damages for an overcharge. Though the state courts did entertain similar penal actions under Rhode Island law, the state supreme court held that it was contrary to the state's policy to entertain such actions arising under the laws of a government "foreign" in the "private international" sense. Viewing federal law that way, the state court refused to allow the action.

In reversing that decision, this Court pointed out that federal law is the prevailing policy in every state. By virtue of the Supremacy Clause of the Constitution[33] federal law cannot be contrary to state policy. Since "the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action" the Court held that "the State courts are not free to refuse enforcement of petitioners' claim." (330 U. S. at 394.)

Habeas corpus in Nebraska is likewise "adequate and appropriate under established local law" to adjudicate petitioner's claim that the conviction under which he is held was obtained in violation of his constitutional right to counsel. The state has no "valid excuse" to refuse to litigate this claim. See *Testa* v. *Katt*, 330 U.S. at 392-93. The discussion of Nebraska habeas corpus earlier in this brief shows that the state makes the writ available where the convicting court lacked jurisdiction over the subject matter or the person or where it was without power to enter the

[33] U.S. Constitution, Art. VI, para. 2: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

sentence. As otherwise stated by the Nebraska court, where the conviction or sentence is an "absolute nullity" or is "absolutely void" habeas corpus will lie. *Hawk* v. *O'Grady*, 137 Neb. 639, 641, 290 N.W. 911, 912 (1940); *In re Application of Dunn*, 150 Neb. 669, 675, 35 N.W.2d 673, 677 (1949). That the effect of an unconstitutional denial of counsel is to render a conviction void and an "absolute nullity" is made plain by the following portions of the opinion in *Johnson* v. *Zerbst*, 304 U.S. 458:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void . . . (304 U.S. at 467-68).

Though in *Johnson* v. *Zerbst* a federal conviction was being attacked under the Sixth Amendment, that is no basis for distinguishing it from the instant case, in light of *Gideon* v. *Wainwright*, 372 U.S. 335. For in *Gideon*

the right to counsel established for federal defendants by *Johnson* v. *Zerbst* was held to be vested likewise in state criminal defendants by the Fourteenth Amendment. As a result a state court, like a federal court, "no longer has jurisdiction to proceed" unless the guaranty of counsel is satisfied. If there is an unconstitutional deprivation of counsel, as petitioner's papers show here, then the state judgment is a "judgment of conviction pronounced by a court without jurisdiction," and it therefore "is void."

The refusal of Nebraska to adjudicate a right to counsel claim is thus a refusal to adjudicate a claim which goes to the jurisdiction of the convicting court and renders petitioner's sentence a nullity. Yet, at the same time, Nebraska hears other claims going to the jurisdiction of the court. The claims which it does hear stem from state law. The only jurisdictional claims it refuses to hear stem from the Federal Constitution. This is patently the kind of discrimination against federal law condemned by *McKnett* and *Testa*.[34]

To adjudicate petitioner's claim adequately would require an evidentiary hearing. Nebraska law contemplates that such a hearing can be conducted on habeas corpus. State statutes provide that the habeas corpus court may issue subpoenas for witnesses and may hold a hearing at which witnesses are examined.[35] There is nothing in Nebraska law to suggest that the state habeas corpus machinery is not wholly "adequate and appropriate . . . to adjudicate this action." Accordingly, "the State courts are not free to refuse enforcement of petitioners' claim." *Testa* v. *Katt*, 330 U.S. at 394.

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[34] Apparently this argument has not previously been presented to the Court in a state habeas corpus case. See Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 1143, 1148 n. 27 (1953).

[35] Neb. Rev. Stat. §§ 29-2803, 29-2805.

In summary, with habeas corpus Nebraska has provided the machinery for corrective process, but it has defined its scope here in a way that excludes federal law claims which are essentially the same as the state law claims which the court does adjudicate. All that this Court need do, therefore, is to require Nebraska to treat petitioner's federal constitutional claim of want of jurisdiction the same as Nebraska treats state claims of want of jurisdiction under its existing habeas corpus procedure.

Conclusion

For all of the reasons set forth, the judgment below cannot stand. Petitioner has alleged facts showing prima facie a violation of his constitutional right to counsel, and he has been unconstitutionally denied a hearing on that claim by the Nebraska court. The judgment should be reversed, or vacated, and remanded with directions that by some procedure the petitioner's claim be adequately adjudicated.

Respectfully submitted,

DANIEL JOHN MEADOR
Counsel for Petitioner

Clark Hall
Charlottesville, Virginia

March, 1965

APPENDIX A

Nebraska Statutes

REVISED STATUTES OF NEBRASKA (1943):

§ 28-532.—*"Burglary," defined; penalty.* Whoever willfully, maliciously and forcibly breaks and enters into any dwelling house, kitchen, smokehouse, slaughterhouse, shop, office, storehouse, mill, pottery, factory, watercraft, schoolhouse, church or meeting house, barn, chicken house, stable, warehouse, malthouse, stillhouse, public building, or other private building, railroad car factory, station house, railroad car, public or private telephone pay station or booth, with intent to kill, rob, commit a rape, or commit any felony, or with intent to steal property of any value, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months.

§ 29-2801.—*Habeas corpus; writ; when allowed.* If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed

to the proper officer, person or persons who detains such prisoner.

§ 25-1912 (1963 Supp.)—*Appeal to Supreme Court; civil and criminal actions; procedure; notice of appeal; docketing fee; filing of transcript.* The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, and, except as otherwise provided in section 29-2306, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. . . .

§ 29-2103.—*New trial; motion, when made; grounds, how assigned; newly discovered evidence.* The application for a new trial shall be by motion upon written grounds, and may be filed either within or without the term at which the verdict is rendered. It shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed within ten days after the verdict was rendered unless unavoidably prevented. In assigning the grounds for such motion, it shall be sufficient to assign the same in the language of the statute and without further or other particularity. In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial; *Provided*, that such motion is filed

within a reasonable time after the discovery of the new evidence; *and provided further,* that such motion must be filed within three years after the date of such verdict, and such motion and the procedure herein provided shall be the exclusive method and procedure for reviewing criminal cases after the expiration of the term at which such verdict is rendered.

§ 25-21,149.—*Declaratory judgments; courts of record; jurisdiction.* Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

APPENDIX B

Hawk's Quest for a Remedy

In 1936 Henry Hawk was convicted of murder and sentenced to life imprisonment by a Nebraska court. He later initiated proceedings contending that at his trial his constitutional right to the assistance of counsel had been violated. After five years of litigation this Court held, in 1945, that Hawk was entitled to a hearing on this claim. 326 U.S. 271. After seven more years, in 1952, Hawk was finally given a hearing on federal habeas corpus; he established his claim with proof and was ordered discharged. Pending an appeal by the state from that decision, Hawk died on April 21, 1953, thereby rendering the case moot seventeen years after the conviction.

All reported stages of this litigation are set out below.

Hawk v. *O'Grady*, 137 Neb. 639, 290 N.W. 911, *cert. denied*, 311 U.S. 645 (1940) (habeas corpus denied).

Hawk v. *Olson*, 130 F.2d 910 (8th Cir. 1942), *cert. denied*, 317 U.S. 697 (1943) (federal habeas corpus denied for failure to exhaust state remedies).

Ex Parte Hawk, 318 U.S. 746 (1943) (leave to file original petition for habeas corpus denied).

Ex Parte Hawk, 321 U.S. 114 (1944) (leave to file original petition for habeas corpus denied following denial without opinion in state supreme court, federal district court, and court of appeals).

Hawk v. *Olson*, 145 Neb. 306, 16 N.W.2d 191 (1944) (habeas corpus denied), *rev'd*, 326 U.S. 271 (1945) (habeas corpus petition stated a case for relief entitling petitioner to hearing).

Hawk v. *Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946) (on remand, hearing denied; habeas corpus not proper in state court unless judgment absolutely void).

Hawk v. *Olson*, 66 F. Supp. 195 (D.C. Neb. 1946), *aff'd sub nom.*, *Hawk* v. *Jones*, 160 F.2d 807 (8th Cir.), *cert. denied*, 332 U.S. 779 (1947) (federal habeas corpus denied for failure to exhaust state remedy of coram nobis).

Hawk v. *State*, 151 Neb. 717, 39 N.W.2d 561 (1949), *cert. denied*, 339 U.S. 923 (1950) (coram nobis denied).

Hawk v. *Hann*, 103 F. Supp. 138 (D. Neb. 1952) (habeas corpus granted and release ordered).

Hann v. *Hawk*, 205 F.2d 839 (8th Cir. 1953) (vacated as moot because of Hawk's death; remanded with direction to dismiss), *rehearing denied*, 207 F.2d 82 (8th Cir. 1953).

APPENDIX C

The Illinois Merry-Go-Round*

White v. *Ragen*, 324 U.S. 760 (1945) (dismissed; habeas corpus wrong remedy)

Woods v. *Nierstheimer*, 328 U.S. 211 (1946) (dismissed; coram nobis possibly available)

Carter v. *Illinois*, 329 U.S. 173 (1946) (affirmed; scope of review on writ of error limited under state practice to "common law record" which did not include information bearing on deprivation of constitutional rights)

McLaren v. *Nierstheimer*, 329 U.S. 685 (1946) (reversed; state concession that habeas corpus is proper remedy and that hearing should be granted)

Foster v. *Illinois*, 332 U.S. 134 (1947) (affirmed; scope of review limited to common law record)

Marino v. *Ragen*, 332 U.S. 561 (1947) (reversed; state concession that habeas corpus is proper remedy and that hearing should be granted)

Bute v. *Illinois*, 333 U.S. 640 (1948) (affirmed; scope of review limited to common law record)

Loftus v. *Illinois*, 334 U.S. 804 (1948) (continued pending clarification whether state decision rested on erroneous choice of remedy or on federal question)

Loftus v. *Illinois*, 337 U.S. 935 (1949) (dismissed; writ of error appropriate, not habeas corpus)

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* *Marino* v. *Ragen*, 332 U.S. 561, 570 (Mr. Justice Rutledge dissenting). This series of cases is set forth and commented on in Hart & Wechsler, The Federal Courts and the Federal System 513-15 (1953), and in Jenner, the Illinois Post-Conviction Hearing Act, 9 F.R.D. 347 (1950).

Young v. *Ragen*, 337 U.S. 235 (1949) (remanded for consideration of availability of habeas corpus in light of *Loftus*)

Jennings v. *Illinois*, 342 U.S. 104 (1951) (vacated and remanded to determine scope of Post Conviction Hearing Act)

APPENDIX D

Uniform Post-Conviction Procedure Act (1955)

9B Uniform Laws Annotated 352

§ 1. [*Remedy—To Whom Available—Conditions*].—Any person convicted of a felony and incarcerated under sentence of [death or] imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in this Act, it comprehends and takes the place of all other common law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of [death or] imprisonment, and shall be used exclusively in lieu thereof. A petition for relief under this Act may be filed at any time.

§ 2. [*Exercise of Original Jurisdiction in Habeas Corpus*].—[[The Supreme Court, Circuit Court, District Court] in which, by the Constitution of this State, original jurisdiction in habeas corpus is vested, may in accordance with its rules, entertain a proceeding under this Act in an exercise of its original jurisdiction. In this event, the pro-

visions of this Act, to the extent applicable, shall govern the proceeding.]

§ 3. [*Commencement of Proceedings—Verification—Filing—Service*].—[Except in a proceeding brought under Section 2 of this Act,] the proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The [Supreme Court, Court of Appeals] may by rule prescribe the form of verification. The clerk shall docket the petition upon its receipt and bring it promptly to the attention of the court and the [prosecuting attorney, county attorney, state's attorney, attorney general].

§ 4. [*Petition—Contents*].—The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the petition is based, and clearly state the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from other allegations of facts, and shall be verified as provided in section 3 of this Act. Affidavits, records, or other evidence supporting its allegations shall be attached to the petition or the petition shall state why they are not attached. The petition shall also identify any previous proceedings that the petitioner has taken to secure relief from his conviction. Argument, citations, and discussion of authorities shall be omitted from the petition.

§ 5. [*Proceeding as a Poor Person*].—The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall order that the petitioner proceed as a poor person, and appoint counsel for him. If after judgment, a review is sought by the petitioner, and the hearing court is of the opinion that the review is requested in good faith, and finds that the petitioner is unable

to pay the costs of the review, the court shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by [the county in which the judgment is rendered].

§ 6. [*Pleadings*].—Within [thirty (30)] days after the docketing of the petition, or within any further time the court may fix, the State shall respond by answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of the filing of any pleading other than the original petition.

§ 7. [*Hearing—Evidence—Order*].—[Except in a proceeding brought under Section 2 of this Act,] the petition shall be heard in the court in which the conviction took place and before any judge thereof. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a state right was presented and decided. This order constitutes a final judgment for purposes of review.

§ 8. [*Waiver of Claims*].—All grounds for relief claimed by a petitioner under this Act must be raised in his original or amended petition, and any grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

§ 9. [*Review*].—A final judg ent entered under this Act may be reviewed by the [Supreme] Court of this State on [appeal, writ of error] brought by either the petitioner or the state within [six (6) months] from the entry of the judgment.

§§ 10, 11, 12, 13, 14 omitted.